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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAJA NORI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the government fail to establish, by legally sufficient evidence, that petitioner and another knowingly agreed to conspire together to import a controlled narcotic substance?

2. Did the trial judge's charge *sua sponte* suggesting an explanation for the defendant's failure to testify violate the applicable statute and the Constitution?

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RAJA NORI,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Raja Nori respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 6, 1983.

Opinions Below

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed the judgment entered, following a jury trial, in the United States District Court for the Eastern

District of New York (Sifton, J.), convicting petitioner of one count of conspiracy to import a controlled narcotic substance (21 U.S.C. §§952(a), 960 and 963); importing a controlled narcotic substance (21 U.S.C. §§952(a) and 960(a)(1)); and possession with intent to distribute a controlled narcotic substance (21 U.S.C. §841(a)(1)). Petitioner was sentenced to a term of six years' imprisonment on each of the three counts, to run concurrently, and to be followed by a special parole term of five years.[1]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the affirmance on December 6, 1983, by the Court of Appeals for the Second Circuit of petitioner's judgment of conviction.

Constitutional Provisions Involved

United States Constitution, Amendment 5.

The provision appears in Appendix B to this petition.

Statutory Provisions Involved

18 United States Code §3481; 21 United States Code §§841(a)(1), 952(a), 960 and 963. These provisions appear in Appendix C to this petition.

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[1] At the conclusion of the government's case, the District Court dismissed one count charging petitioner with the distribution of a narcotic substance. Petitioner's wife and co-defendant at trial was acquitted of all charges against her.

Statement of the Case

Petitioner Raja Nori was convicted of conspiracy to import a controlled narcotic substance, aiding and abetting the illegal importation of a controlled narcotic substance, and possession with intent to distribute a controlled narcotic substance. At trial, the government's case was presented primarily through the testimony of Pedro Soriano, who had been previously convicted for his participation in the charged drug smuggling scheme.[2] Soriano's defense at his own trial had been that he was smuggling diamonds, not narcotics, and, at this trial, he continued to assert that he intended to engage in the importation of diamonds only into the United States.

Soriano knew Nori from certain construction projects that they had been associated with at the time Nori approached him, in January, 1982, about smuggling diamonds from India into the United States. (T. 309-10).[3] Nori stated that in order to avoid the payment of customs duty on the diamonds, they would need someone with a diplomatic passport to carry the diamonds through airport customs. Nori told Soriano he would receive $50,000 for travelling with the diplomat who would, in turn, receive $100,000 for the use of his official status. (T. 314-16).

Soriano then arranged a meeting between Nori and Arlina Perez, an official with the Dominican Tourist

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[2] Pedro Soriano was convicted, in a separate trial, of conspiracy, importation, and possession of the same heroin which was the subject matter of the instant case.

[3] Numbers in parenthesis preceded by the letter "T" refer to pages in the transcript of the trial.

Bureau in New York.[4] Nori explained his proposal to Ms. Perez, who then offered her assistance in locating an individual with the required diplomatic credentials. Perez was successful in interesting both Dante Sanchez and Raphael Pena, Dominican diplomats in Nori's proposition, and she arranged a meeting between all concerned. (T. 320). Nori again outlined his diamond smuggling scheme for Sanchez and Pena, and they agreed that one of them would make the trip for the $100,000 Nori had offered. As it turned out, Sanchez recruited Alelis Martinez to travel to India with Soriano, where they would pick up the diamonds. It would then be Pena's role to meet Martinez and Soriano at the airport and take possession of the diamonds.[5]

Martinez had previously obtained a diplomatic passport at the suggestion of Sanchez, who had described to Martinez the scheme as one to import unspecified merchandise into the United States. Martinez understood that the diplomatic passport was necessary to the scheme so that one could pass through Customs without an inspetion. Sanchez had informed Martinez that his role was to travel to India with another diplomat and that, in exchange, he would receive part of the $100,000 promised to Sanchez and Pena.

Although it was originally contemplated that Sanchez would travel to India with Sorino, after Nori had already

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[4] Although Soriano was a naturalized citizen of the United States, he had been born in the Dominican Republic and frequented the tourist bureau to maintain contacts with certain Dominican friends.

[5] Martinez pled guilty to the lesser charge of general smuggling and testified pursuant to an agreement with the government. He maintained throughout that, although he was aware he was engaged in smuggling, he never in fact knew what the merchandise was.

left for India, Martinez substituted for Sanchez. In order to facilitate Martinez' planned entry into India, Soriano had Miriam Nori obtain a letter addressed to the Indian Consulate from her employer, the Nathan Greenberg Diamond Company. The letter requested that a visa be issued to Martinez so that he could travel on behalf of the diamond company.[6] Martinez and Soriano used this letter to obtain a visa for travel to India.

The travel plans changed, and it was agreed Soriano and Martinez would journey to London, England, where they would await Nori's return from India with the diamonds. Martinez was to receive a baggage claim ticket from Nori and he would be responsible for taking the diamonds through United States Customs. In accordance with these revised plans, Martinez and Soriano flew to London on April 4, 1982, to await further instructions from Nori. Although Nori was expected in London within three or four days, he was ultimately delayed in India.

Finally, on April 12, Nori telephoned Soriano in London to inform him that he, Nori, would not be able to meet Soriano on the airplane back to New York, but that, instead, a friend would meet him. The friend would identify himself to Soriano and give him the baggage claim check for the suitcase containing the diamonds. (T. 111, 358-59, 362).

Pursuant to Nori's instructions, Martinez and Soriano boarded the Air India flight bound for New York. (T. 368). When they were on board, a man approached Soriano and identified himself as Nori's friend. The man then gave Soriano the claim ticket, and Soriano, in turn, gave the ticket to Martinez so that he could take it through customs. When Martinez pressed Soriano for an explana-

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[6] Emile Greenberg, president of the company, testified at trial that he had not written the letter and did not know Martinez.

tion as to the nature of the merchandise, Soriano finally told him it was diamonds. (T. 374).

Upon arrival in New York, Martinez and Soriano separated. Martinez retrieved the suitcase containing the diamonds, and he presented his diplomatic passport to the customs inspector, who instructed him to open the suitcase. When the suitcase was opened, four pounds of heroin were discovered.[7] Unaware that Martinez had been detained by customs officials, Soriano made his way out of the airport. On the way, he ran into Miriam Nori and Ralphael Pena. Later that night, Soriano learned of Martinez' arrest and of the true contents of the suitcase. When Nori was questioned several months later about where he had been in February, 1982, he told federal agents he had been to India to visit his sick mother.

At the conclusion of the government's case, Nori moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the ground that the government had failed to establish his knowing agreement to import drugs. (T. 591-92, 600).

The Court, in its charge to the jury, *sua sponte*, instructed that no inference could be drawn from Nori's failure to testify on his own behalf, since this failure, in part, may have resulted from a lack of facility with the language or deficient intelligence. Counsel made a timely objection to this charge.

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[7] The suitcase also contained items of men's clothing, a towel from the Bombay Ritz Hotel, Indian foodstuffs and Indian newspapers.

REASONS FOR GRANTING THE WRIT

POINT ONE

The evidence was insufficient to establish beyond a reasonable doubt that petitioner agreed to import narcotics.

A conspiracy is an "agreement among the conspirators." *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). A "meeting of the minds" is required. *Krulewitch* v. *United States*, 336 U.S. 440, 448 (1949) (Jackson, J., concurring). The law of conspiracy requires that two people agree and that they agree as to the "object" of the conspiracy. Note, Developments in the Law—Criminal Conspiracy, 72 Harv.L.Rev. 920, 929-33 (1959). In the instant case, the government's own witnesses, Martinez and Soriano, admitted participants in the venture, both denied they had agreed to import narcotics, insisting instead that they were smuggling only diamonds. The record was, therefore, barren of any evidence that Nori had agreed with anyone to import a narcotic substance in the United States.

In order to establish an agreement for the purpose of a finding of conspiracy, it must be shown that the conspirators have agreed on the "essential nature of the plan." *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947). The degree of specificity which is required to establish the fact of an agreement depends on the facts of the particular case.

In *United States* v. *Gallishaw*, 428 F.2d 760 (2d Cir. 1970), the defendant was convicted after the trial judge charged he could be convicted of conspiracy to rob a bank if he had rented a machine gun to another individual with knowledge there was a conspiracy to do something wrong and to use the gun to violate the law. 428 F.2d at 762.

The Second Circuit reversed the conviction and stated that, at the very least, the government was required to show the defendant knew a bank was to be robbed. The court wrote that the defendant "had to know what kind of criminal conduct was in fact contemplated." 428 F.2d at 763.

Similarly, in *United States* v. *Rosenblatt*, 554 F.2d 36 (2d Cir. 1977), the Second Circuit reversed defendant's conviction on the basis that he and his alleged co-conspirator Brooks never agreed about the type of fraud in which they were engaged. Brooks was defrauding the United States by obtaining payment for government checks which he had caused to be printed without authorization. The defendant Rosenblatt had been told by Brooks the checks were valid, but that the purpose of the operation was to evade taxes and conceal kickbacks. Both men agreed to defraud the United States, but neither agreed on the type of fraud. See also *United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir. 1974).

In the instant case, neither Soriano nor Nori had ever agreed with each other to import a controlled narcotic substance into the United States. Soriano first learned of the venture to import diamonds when he was told of it by petitioner Nori. Soriano agreed to participate in that venture and arranged to find someone with a diplomatic passport to facilitate the importation of the diamonds. Soriano travelled with Martinez to London and there received instructions concerning the transfer of the baggage claim receipt to him from Nori. Soriano then met another individual on the flight back from London to New York who identified himself as Nori's friend. This individual gave him the baggage receipt for the suitcase which Soriano then thought contained diamonds. Soriano's actions are, thus, totally consistent with his position that he agreed to smuggle diamonds and believed that was what he was doing. Even if petitioner Nori knew the object of

the conspiracy was narcotics, there was still no agreement with Soriano and, therefore, no conspiracy. See *United States* v. *Mora*, 598 F.2d 682 (1st Cir. 1979).

Since "the gist of the offense remains the agreement . . . it is . . . essential to determine what kind of agreement or understanding existed as to each defendant." *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). "[A]greement is the essential evil at which the crime of conspiracy is directed" and it "remains the essential element of the crime." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975).

The instant case is easily distinguishable from *United States* v. *Mariani*, 539 F.2d 915 (2d Cir. 1976). In *Mariani*, two New York City police officers, acting on a tip that a red and white gypsy taxicab would be used in a bank robbery on a particular day, kept the vehicle under surveillance. The detectives saw two males enter the cab. Mariani sat in the driver's seat and his co-defendant sat in the rear. The cab proceeded down the street passed the bank and turned a few minutes later. Mariani double parked in front and kept the engine running while the co-defendant entered the bank. The co-defendant robbed the bank at gun point and left it only to be arrested a short distance away. Shortly after the co-defendant entered the bank, Mariani drove away at a high rate of speed and eluded the police. The co-defendant confessed and implicated Mariani. Mariani was subsequently arrested and he, too, confessed. Although the co-defendant's statement was not introduced at trial, Mariani took the stand in his own defense and was questioned about his statement. The Second Circuit held that the evidence was sufficient to sustain Mariani's conviction.

In *Mariani*, the defendant's own testimony inculpated him in the offense, as did the testimony of the surveillance agents. The contradictions between their testimony could reasonably have allowed the trier of fact to discredit

Mariani's testimony. The situation is different in the instant case, where the defendant did not testify and, indeed, the government's own witnesses established the lack of agreement between the parties.

It is clear under the general rules of conspiracy that petitioner could not have been validly convicted of conspiracy to import narcotics, since there is no evidence he agreed to commit that offense. *See, e.g., United States* v. *Figueroa,* Docket No. 82-5699 (11th Cir. Dec. 5, 1983). If the conspiracy was never appropriately established, all statements received in evidence as being within the co-conspirator exception to the hearsay rule should have been stricken and not received as evidence of the commission of the substantive offenses. The conviction on count one charging a conspiracy must be reversed and dismissed, and a new trial ordered as to the remaining counts in the indictment.

POINT TWO

A trial judge's charge *sua sponte* suggesting an explanation for the defendant's failure to testify is constitutionally erroneous and statutorily improper.

Since this Court's decision in *Bruno* v. *United States,* 308 U.S. 287 (1939), federal trial judges have been under mandate to instruct the jury that it may not draw any negative inference from the fact that the defendant did not testify in his own behalf.[8] This requirement followed

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[8] The requested instruction in *Bruno* was:

> The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

not merely because of the fifth amendment privilege against self-incrimination, but because of statutory enactment. *See* 18 U.S.C. §3481.

In *Lakeside* v. *Oregon*, 435 U.S. 333 (1978), the Court held that a trial judge's rendition of a "no inference" charge to the jury, even where not requested and given over defense objection, was not deemed consitutional error in light of the concern in for adverse comment. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229 (1965).

Later, in *Carter* v. *Kentucky*, 450 U.S. 288, 101 S.Ct. 1112 (1981), the Court, in dealing with the converse situation, held that the constitutional implications of the trial court's failure to render a "no inference" charge when specifically requested to do so did not require a reversal of the defendant's conviction. *See also United States* v. *Bain*, 596 F.2d 120 (5th Cir. 1979).

The case at bar focuses not only upon the consequence of a charge of "no inference," but also upon the incorporation within the instruction of an explanation for the defendant's declination to testify which was neither requested by the defendant, nor had any basis in the trial record.

More specifically, the court charged the jury:

> The defendants in this case have not testified. A defendant has a right, under our Constitution, not to testify because, for among other reasons, one's guilt or innocence should not be determined in any degree by one's intellectual or other inherent ability to defend oneself. We are all equal before the law but we are not all equally able to express ourselves to say what we mean or to defend ourselves against unjustified accusations. Accordingly, you are not to consider in any way in this case the fact that a defendant did not testify.

(A. 18-19).

Objection to this charge was made by counsel for Nori in a timely and appropriate manner. (A. 20-24). Counsel's objection was twofold: the charge highlighted for the jury Nori's failure to testify, and it suggested this failure was owing to a lack of intelligence or facility with the language.

The preferred instruction to be given in response to a defendant's request for a "no inference" charge is readily available to trial judges. *See 1 Federal Jury Practice and Instructions*, Sec. 17.14 (Devitt and Blackmar, 3d Ed.); *Federal Criminal Jury Instructions of the Seventh Circuit*, Sec. 3.14 (West Pub. Co. 1980); *Pattern Jury Instructions Criminal Cases, 5th Circuit*, Sec. 3B (West Pub. Co. 1979); *Pattern Criminal Jury Instructions (Report of the Federal Judicial Center Committee to Study Criminal Jury Instructions*, Sec. 22 (West Pub. Co. 1982); *Criminal Jury Instructions for the District of Columbia*, Sec. 2.26 (3d Ed. 1978).[9]

Neither this Court nor the Circuit Courts of Appeals have adopted a required judicial catechism to be recited to the jury when a "no inference" charge is requested. *See United States* v. *Smith*, 392 F.2d 302, 303 (4th Cir. 1968). However, it is quite another matter, and becomes legally erroneous, when the trial judge gratuitously suggests explanations or reasons why the defendant did not testify. *See United States* v. *Weir*, 348 F.2d 453 (4th Cir. 1965). *Cf. United States* v. *Schabert*, 362 F.2d 369, 372-373 (2d Cir. 1966).

The failure to properly instruct the jury in this regard has clearly been held to constitute reversible error in a proper case. *United States ex rel. Amaio* v. *Reincke*, 300 F.Supp. 367, 368 (D.Conn. 1969), *aff'd*, 416 F.2d 1333 (2d

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[9] Cited with approval in *United States* v. *Patterson*, 648 F.2d 625, 630 (9th Cir. 1981).

Cir. 1969); *People* v. *Britt*, 43 N.Y.2d 111, 400 N.Y.S.2d 785, 786 (1977); *People* v. *Abreu*, 74 A.D.2d 876, 426 N.Y.S. 2d 33, 34 (2d Dep't 1980).

Concededly not every variation upon the spare, balanced and neutral language statutorily suggested and recommended by the commentators requires reversal. *United States ex rel. Pinder* v. *Ziegler*, 325 F.Supp. 379, 382 (E.D.Pa. 1971). However, when, as in the case at bar, the trial court offers an explanation which was not based upon the trial testimony and which was spurned and excepted to by the defendant, the court is acting beyond the bounds of protecting the fifth amendment privilege against self-incrimination. 18 U.S.C. §3481.

The jury in the case at bar had observed the defendant conferring with his attorney without apparent difficulty and had heard the witnesses at trial attribute statements to him. In light of this, the trial court's suggestion as to why Nori declined to testify could only be reasonably viewed with suspicion, if not disbelief, by the jury. This was not harmless error.

This Court should grant the writ so that, at its next term, the proper judicial language to be employed can be clarified for the benefit of the district courts. To deny the writ will only continue disparate treatment of a fundamental constitutional right.

CONCLUSION

For the reasons stated, we respectfully pray that a writ issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

BARRY KAMINS
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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Sixth day of December one thousand nine hundred and 1983.

Present:

Honorable J. Edward Lumbard,
Honorable Ralph K. Winter,
Honorable George C. Pratt,
Circuit Judges.

Docket No. 83-1319

UNITED STATES OF AMERICA,

Appellee,

v.

RAJA NORI,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of the court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

We have reviewed the record and concluded that the jury could reasonably find that Soriano knowingly engaged in a conspiracy with the defendant to smuggle heroin. The nature of the relationship between Soriano and the defendant and the former's involvement in the scheme constituted circumstantial evidence supporting the jury's finding. Moreover, the jury was permitted to disbelieve Soriano's testimony that he believed diamonds were involved and to draw a contrary inference, namely that he knew the conspiracy involved narcotics. *See United States* v. *Mariani*, 539 F.2d 915, 920 (2d Cir. 1976).

Finding no error in the record, we affirm.

HONORABLE J. EDWARD LUMBARD

HONORABLE RALPH K. WINTER

HONORABLE GEORGE C. PRATT

APPENDIX B

Constitutional Provisions Involved

United States Constitution, Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

Statutes Involved

18 U.S.C. § 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Appendix C

21 U.S.C. § 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title.

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Appendix C

21 U.S.C. § 960. Prohibited acts A

Unlawful Acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

21 U.S.C. § 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

END OF DOCKET